

The respondent requests review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment with the respondent; (2)

whether the claimant gave timely notice; (3) the nature and extent of disability; and (4) whether the claimant is entitled to unauthorized and future medical.

Respondent argues the claimant has not sustained her burden of proof that her accidental injury arose out of and in the course of employment. Respondent further argues the claimant failed to provide timely notice of the accident and therefore the ALJ's Award should be reversed. In the alternative, respondent argues claimant's award of compensation should be limited to a scheduled disability to her left hand. And in the event it is determined claimant suffered a whole person permanent injury she should be limited to her functional impairment as she did not make a good faith effort to retain her employment.

Conversely, claimant argues the ALJ's Award should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Initially, the respondent argues that claimant failed to provide timely notice of her injuries. The injured worker is required to give the employer notice of accident, within 10 days after the date of a work-related accident, or establish just cause for not giving the employer the 10-day notice which extends the notice time period to 75 days.<sup>1</sup>

When claimant first began experiencing pain and numbness in her hands as well as her fingers she thought her condition might be related to diabetes since she is insulin dependent. She sought treatment with her personal physician who referred her to Dr. Michael J. Schmidt, a board certified orthopedic surgeon.

At her first appointment with Dr. Schmidt on September 14, 2004, the claimant checked that her condition was not work-related on the new patient information sheet. The doctor referred claimant for an EMG/nerve conduction study. The studies showed claimant had severe carpal tunnel syndrome on the right and moderate on the left. The claimant testified that at her next scheduled medical appointment on September 28, 2004, Dr. Schmidt told her the results of the nerve conduction studies and further told her the condition was work-related.

The claimant immediately contacted her supervisor, Jenise Weakland, and told her that she had been diagnosed with carpal tunnel syndrome, surgery had been scheduled and the doctor had said the condition was work-related. Claimant testified that her

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<sup>1</sup> See K.S.A. 44-520.

supervisor said she would take care of it. When first deposed Ms. Weakland testified that she remembered claimant telling her she had been diagnosed with carpal tunnel syndrome and that surgery had been scheduled but she did not remember claimant saying the condition was work-related. When again deposed approximately six months later, Ms. Weakland denied claimant said her condition was work-related.

The claimant initially sought treatment for her hand problems from her personal physician who referred her for treatment. When she sought that treatment she still thought her condition was related to her diabetes. Upon being told that her condition was work-related, claimant immediately contacted her supervisor and told her the doctor had said the condition was work-related. The Board finds claimant's testimony more persuasive than the equivocal testimony from her supervisor. The Board finds claimant has met her burden of proof to establish that she provided timely notice of her injuries to the respondent.

It should be noted that respondent argued that the only notice provided was for the left hand injury when claimant filed her application for hearing. This argument is rendered moot by the Board finding claimant provided timely notice of her bilateral carpal tunnel injuries when she told her supervisor that Dr. Schmidt had diagnosed her condition as work-related.

Respondent next argues the claimant did not meet her burden of proof to establish that she suffered an accidental injury arising out of and in the course of her employment. The Board disagrees.

Claimant was employed as a switchboard operator for respondent. Her job duties included but was not limited to operating the switchboard, answering the phone, operating a computer and scanner, filing as well as filling the soft drink machine. Respondent argues that claimant's job duties did not require repetitive use of her hands. But this argument is premised upon viewing in isolation each task claimant performed. But that does not accurately depict claimant's activities because when viewed in the aggregate she repetitively used her hands to perform her various job duties.<sup>2</sup> Dr. Dick Geis and Dr. Vito Carabetta, respondent's medical expert, both opined that claimant's bilateral carpal tunnel syndrome was caused by her work activities for respondent. And claimant said that Dr. Schmidt told her that her bilateral carpal tunnel injuries were work-related. The medical opinions were uncontroverted. The claimant has met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment with respondent.

Respondent further argues claimant should be limited to her functional impairment because she was terminated for cause.

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<sup>2</sup> See *Hayward v. Cessna Aircraft Co.*, 31 Kan. App. 2d 934, 79 P.3d 179 (2002).

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he or she is earning 90 percent or more of the employee's pre-injury wage. However, it is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).<sup>3</sup> Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.<sup>4</sup> And a termination for good cause can prohibit an employee from receiving an award of work disability.<sup>5</sup>

The Board notes that the test of whether a termination disqualifies an injured worker from entitlement to a work disability remains one of good faith, on the part of both claimant and respondent.<sup>6</sup>

In the *Niesz*<sup>7</sup> decision the Court found that a claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination and, thus, there could still be an award of work disability.

In this case the claimant had right carpal tunnel surgery performed on October 4, 2004, and had returned to work performing only her switchboard operator job tasks. The left carpal tunnel surgery had been scheduled for January 2005. On December 1, 2004, claimant was taken to the conference room and was told she was being terminated from employment with respondent without further explanation.

Claimant's supervisor, Ms. Weakland, stated that claimant was terminated for failing to comply with terms of behavior that all the employees had been counseled about at a meeting on November 11, 2004. But a review of claimant's personnel file reveals that she had received only a single written reprimand in 2001 and since that time had received excellent evaluations, been named employee of the year, and most significantly she had never been counseled about any job performance deficiencies before she was summarily terminated. Moreover, there is no record claimant received progressive discipline or the opportunity to improve any alleged job deficiencies. Consequently, it cannot be said

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<sup>3</sup> *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

<sup>4</sup> *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, rev. denied 265 Kan. 884 (1998).

<sup>5</sup> See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, rev. denied 267 Kan. 889 (1999), and *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>6</sup> See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

<sup>7</sup> *Niesz v. Bill's Dollar Stores*, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

claimant's actions were tantamount to refusing to work or failing to make a good faith effort to retain appropriate employment. Accordingly, claimant is entitled to a work disability analysis.

Respondent finally argues claimant should be limited to her functional impairment because Dr. Carabetta did not think she needed any restrictions and accordingly she would have no task loss. Moreover, respondent further argues claimant did not make a good faith job search.

Dr. Geis opined that claimant should observe permanent restrictions of no repetitive work for over 40 minutes. Dr. Schmidt agreed claimant should not engage in activities that require prolonged or repetitive gripping. Conversely, Dr. Carabetta did not impose any permanent restrictions. The ALJ determined that restrictions were appropriate for claimant's condition and adopted Dr. Geis' restrictions. And when those restrictions are applied to claimant's 15-year task list compiled by vocational expert Monty Longacre the claimant has a 58 percent task loss. The Board agrees and affirms.

If it is determined that a worker has made a good faith effort to find appropriate employment, the difference in pre- and post-injury wages based on the actual wages can be made. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based on all the evidence, including expert testimony concerning the capacity to earn wages.<sup>8</sup>

At the time of the regular hearing, the claimant remained unemployed. She detailed her job search and provided a list of the prospective employers she had contacted. While claimant was drawing unemployment benefits after her termination she applied for jobs. Claimant contacted Heartland Works but was told she did not qualify for their program because of her husband's income. She was directed to the Kansas State vocational rehabilitation services and was provided assistance from Sharon Larson. Claimant averaged six to ten applications a week. She continued to check with Job Services as well as the internet and the Topeka Capital Journal newspaper for job openings. Claimant's efforts resulted in 15 job interviews but unfortunately no job offers at the time of the regular hearing. The Board finds claimant has satisfied her burden of proof that she has made a good faith effort to find appropriate post-injury employment. Consequently, claimant has a 100 percent wage loss. The Board affirms and adopts the remaining orders set forth in the Award.

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<sup>8</sup> *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369, (1999) *rev. denied* 269 Kan. 931 (2000).

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 25, 2006, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Patricia Wohlford, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge